Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services	))))	CC Docket No. 98-26

REPLY COMMMENTS OF U S WEST COMMUNICATIONS, INC.

Robert B. McKenna
Jeffry A. Brueggeman
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2861

Of Counsel,
Dan L. Poole

William T. Lake
John H. Harwood II
Jonathan J. Frankel
David M. Sohn
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Attorneys for
U S WEST COMMUNICATIONS, INC.

May 6, 1998

TABLE OF CONTENTS

Page

SUMMARY

U S WEST Communications, Inc. (U S WEST") hereby submits its comments in support of its Petition for Relief filed pursuant to Section 706 of the Telecommunications Act of 1996 ("1996 Act").

Congress adopted Section 706 of the Telecommunications Act for the express purpose of ensuring that people in smaller communities have access to the same advanced data and communications services that are available in urban parts of the country. It is clear from the record of this proceeding that there is an urgent need for affordable and higher quality advanced telecommunications services in many parts of the United States. Accordingly, U S WEST's Petition asks the Federal Communications Commission ("Commission") to satisfy its statutory obligation under Section 706 by removing regulatory barriers that prevent U S WEST from providing customers in its region with advanced data networks and services, including Internet backbone and high-speed Digital Subscriber Line ("DSL") services. The premise of U S WEST's Petition is that more competition, rather than more government regulation, is the most effective way of bringing advanced telecommunications services to all Americans.

The Commission has ample authority to grant the relief sought by U S WEST. Section 706 constitutes an independent grant of authority that gives the Commission the power to eliminate statutory and administrative barriers to the deployment of advanced services. There is no merit to the claim that the Commission used the term "regulatory forbearance" in Section 706 merely as an implicit cross-reference to the Commission's Section 10 authority. Interpreting

Section 706 as an independent grant of regulatory authority is necessary to effectuate the provision's purpose of ensuring that all Americans -- rural as well as urban -- have timely access to the communications tools of the new information age. Where regulatory forbearance would serve that purpose, the statute contains no explicit or implicit limitations on the use of those tools, other than the requirement that they be consistent with the public interest, convenience and necessity.

In any event, the Commission has authority even apart from Section 706 to grant the relief sought by U S WEST. The unbundling and resale obligations of Section 251(c) do not apply to U S WEST's provision of advanced data services. Even if these provisions did potentially apply to U S WEST's data services, the Commission still would have authority to exempt the elements used to provide those services from the unbundling requirements of Section 251(c)(3). The Commission also has the authority to modify LATA boundaries with respect to the provision of advanced data services.

U S WEST's Petition explained how existing network providers are risking dividing the country into information "haves" and "have nots." In U S WEST's region, only the largest cities such as Seattle, Denver, Minneapolis and Phoenix have local access to a high-speed (DS-3 or greater) point of presence on the Internet backbone. If U S WEST's request for relief is granted, it will be able to use its facilities to build a backbone reaching deeper into the West and Midwest with greater bandwidth than any existing network.

No commenter has presented any evidence that grant of U S WEST's Petition would harm competition. U S WEST's Petition -- which seeks limited relief from

requirements to unbundle non-bottleneck facilities and resell advanced telecommunications services at a discount -- is carefully structured to avoid having any effect. Moreover, the Section 251(c) unbundling and Computer III requirements which will remain in effect are more than sufficient to ensure that U S WEST's competitors are not hampered in their provision of advanced data services. In fact, U S WEST's Petition will benefit competitive local exchange carriers ("CLEC") and Internet Service Providers ("ISP") in less urban areas by providing them with high-speed connections to the Internet and various options for offering their own DSL services.

Grant of U S WEST's Petition would alleviate the severe shortage of high-speed Internet connections within its fourteen-state region. The effect of this acute shortage is that ISPs outside of urban areas cannot obtain affordable high-speed access to the Internet. If U S WEST is granted interLATA relief, ISPs in non-urban areas will be able to obtain high-speed Internet access from U S WEST without incurring the significant mileage charges that they are forced to incur today.

U S WEST's Petition also is structured to ensure that DSL service providers will be able to provide their own DSL services. Any CLEC still will be able to obtain unbundled loops from U S WEST and provide its own DSL service, so long as the loops are qualified for DSL service. For those CLECs that do not wish to construct a collocation cage in a U S WEST central office, U S WEST will deliver the CLEC's unbundled network elements to a Single Point of Termination ("SPOT") bay located in the central office. While several commenters question U S WEST's motivation in withdrawing Local Area Data Service ("LADS") from state tariffs,

that is a non-issue. LADS was withdrawn because its use as a vehicle through which high-speed data could be transmitted -- a use for which LADS was never intended -- would lead to service problems. Most significantly, if read on a broad basis, LADS would be priced well below its cost.

Moreover, U S WEST does not seek to provide DSL services in a manner which disadvantage ISPs. To the contrary, the company is actively (and successfully) marketing DSL services to third-party ISPs. It is also important to note that DSL is by no means the exclusive means of delivering high-speed data services to the home. Indeed, there are many different technologies being deployed that are capable of providing broadband services.

An important public interest benefit of U S WEST's Petition is that it will alleviate congestion on the circuit-switched voice network. At the same time, U S WEST is not seeking to supplant the voice network. In its Petition, U S WEST requests relief only for its advanced data service. U S WEST will continue to fully comply with the statutory requirements for opening the local exchange to competition and obtaining authority for the provision of interLATA voice services. In addition, U S WEST represents that it will not market or sell telephone voice transmission over its high-speed data network until such time as U S WEST obtains Section 271 authority or is otherwise permitted to participate in the provision of interLATA voice service.

Finally, a number of commenters take the position that advanced telecommunications services must be offered through a separate affiliate which complies with the requirements of Section 272. U S WEST believes that no

separation requirements are necessary. Many of U S WEST's data services are offered in a manner which would not be conducive to separate subsidiary operations. The inefficiencies of a mandated regulatory subsidiary could be significantly diminished if U S WEST were forced to establish a CLEC which purchased unbundled loops and provided both voice and data to the public as a non-incumbent local exchange carrier ("ILEC"). Further, the Commission does not, in the absence of taking decisive preemptive action, have the last word on how U S WEST offers local exchange services within a state.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services	))))	CC Docket No. 98-26

REPLY COMMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") hereby submits its reply comments in support of its Petition for Relief filed pursuant to Section 706 of the Telecommunications Act of 1996 ("1996 Act").[1]

I. INTRODUCTION

Congress adopted Section 706 of the Telecommunications Act to ensure, in Chairman Kennard's words, that we do not become "a nation of information haves and have-nots."[2] Section 706 directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using "regulatory forbearance" to "remove barriers to infrastructure investment." 1996 Act § 706(a) (emphasis added). The Section speaks in broad and mandatory terms, requiring the Commission to take decisive action when existing providers are failing to deploy advanced telecommunications infrastructure to "all Americans," and regulatory barriers prevent other carriers from stepping into the

[1] U S WEST Petition for Relief filed Feb. 25, 1998 ("Petition").

[2] Statement of FCC Chairman William E. Kennard Re Section 706 of the Telecommunications Act of 1996 and Bandwidth, Apr. 22, 1998.

breach.

In its Petition, U S WEST demonstrated that current providers have not deployed advanced telecommunications capability equally to "all Americans." No commenter has rebutted U S WEST's showing that there is a critical shortage of data bandwidth in smaller and rural communities, and that the current providers' deployment plans are relegating these communities to Internet connections that are slower, more expensive, and more prone to failure than those available in big cities. U S WEST also demonstrated that, as the carrier with the largest investment in communications infrastructure in its service region, and as a company with a proven willingness and ability to compete in the data marketplace outside its region, it could bring the information superhighway deeper into the West and Midwest than any current provider has been willing to do -- but only if the Commission carries out the mandate of Section 706 and lifts the regulatory barriers preventing U S WEST from entering this market.

It is therefore not surprising that virtually every commenter representing the interests of end users supports U S WEST's (and the other Bell Operating Companies' ("BOC")) Petitions for regulatory relief. Rural economic development authorities, educational institutions, hospitals, and consumer organizations have all said that the Commission should permit and encourage incumbent local exchange carriers ("ILEC") to deploy advanced data infrastructure and services. These commenters describe how the providers currently in the market are ignoring their needs, making it prohibitively expensive or impossible for them to implement programs such as long-distance learning or telemedicine. For similar reasons,

strong support has come from the technology companies that have an interest in enabling end users to offer and take advantage of ever-more-sophisticated information services. Additional letters have been received by U S WEST in support of its proposal.[3]

Just as unsurprisingly, the fiercest opposition to U S WEST's Petition comes from the companies who are currently in the data services market and are hoping to keep a potential new competitor out. Suddenly abandoning their zeal for competition, these carriers -- including WorldCom, MCI, and AT&T -- make internally inconsistent arguments in an effort to protect their markets. On the one hand, they argue, there are so many competing providers of backbone and other data services that there is no need for U S WEST to be in this business; yet, at the same time, they claim that this market is so fragile that allowing U S WEST in would destroy it. These commenters offer readings of the 1996 Act that border on the Orwellian: One carrier says outright that in directing the Commission to promote "competition," "Congress plainly intended that companies other than the incumbent RBOCs would be allowed . . . . [to] give the consumer a choice of service and equipment and lower prices."[4] And another goes so far as to say that when Congress declared it national policy to keep "the vibrant and competitive free market that presently exists" in data services, "unfettered by Federal . . . regulation," it in fact wanted the Commission to keep potential competitors out of

[3] See Attachment A (letters supporting U S WEST's Petition).

[4] See Electric Lightwave, Inc. ("or ELI") at 1 (emphasis added).

the marketplace and to regulate them heavily.[5]

What the commenters who would keep U S WEST out of the market never do is explain why they are failing to deploy advanced data infrastructure to the very communities that need it most. They do not explain why, even when all thirty-eight current national backbone providers are taken together, only nine of U S WEST's twenty-seven LATAs have local access to more than one high-speed point of presence ("POP"), and seventeen LATAs are not served at all.[6] Nor, despite their assertions of a potential Bell monopoly in data, do they ever explain exactly how U S WEST could leverage its market power in voice into the robustly competitive data services marketplace, especially when U S WEST is committing to continue making loops and collocation space available to competitors on a nondiscriminatory basis.

The Commission appears to have seen through the smokescreen. In a recent speech, Chairman Kennard affirmed his commitment to the principle that, first and foremost, the Commission should rely on competition to facilitate the deployment of infrastructure for advanced services.[7] He also recognized that an incumbent carrier's entry into this marketplace does not automatically mean that it can or will monopolize the market:

> I, for one, am not afraid of seeing wireline telephone providers have a first mover advantage -- if you make the investments to get to market

---

[5] See WorldCom at 30 (discussing 47 U.S.C. § 230(b)(2)).

[6] U S WEST Petition at 16-17.

[7] Remarks by William Kennard, Chairman, Federal Communications Commission, to USTA's Inside Washington Telecom at 5, Apr. 27, 1998.

> first and provided that you do not use your control of the local network to stop or hinder others from investing and trying to be the first to market.
>
> I want to encourage the deployment of high bandwidth access to residential customers, particularly underserved areas, as well as schools and health care facilities across America. And I want to make sure that current regulation does not prevent the deployment of facilities that otherwise would be built. I want incumbent telephone companies to play a major role in the deployment of these services.[8]

U S WEST believes that the Chairman's thinking is proceeding along the right track, and it hopes in these reply comments to encourage that thinking by responding to some of the legal and policy objections that have been raised.

One final introductory comment: U S WEST attempted to craft a limited proposal that would accelerate the deployment of bandwidth to underserved communities while addressing the Commission's legitimate concerns with the state of competition in the local marketplace. U S WEST's Petition asks for targeted interLATA authority and relief from unbundling and discounted resale rules for non-bottleneck facilities and competitively available services; U S WEST has committed itself to allowing competitors to resell its services purchased at retail and continuing to make bottleneck network elements available on an unbundled basis. U S WEST has also committed itself not to use its data facilities to market interLATA voice services until it receives Section 271 approval. But while U S WEST made the effort to put together a narrowly-tailored request for relief, many commenters did not bother to read it. Instead, these commenters make arguments based on the other BOCs' Petitions, accuse U S WEST of trying to avoid

---

[8] Id.

regulatory obligations that it expressly says it will follow, or rail against some hypothetical BOC petition for immediate and total deregulation that no party filed.[9] The commenters' carelessness disserves both the Commission and the people in smaller and rural communities who are still waiting for the full benefits of the Information Age to arrive.

II. THE COMMISSION HAS AMPLE AUTHORITY TO GRANT THE RELIEF SOUGHT BY U S WEST

Section 706 and other provisions of the 1996 Act provide the Commission with ample authority for granting the relief U S WEST has requested. Indeed, some of the measures from which U S WEST seeks relief -- specifically, the unbundling and resale obligations of Section 251(c) -- by their own terms should not apply to U S WEST's advanced data services in the first place.

A. Section 706 Constitutes An Independent Grant Of Authority That Gives The Commission The Power To Eliminate Statutory And Administrative Barriers To The Deployment Of Advanced Telecommunications Services

Section 706 creates both the authority and an affirmative duty for the Commission to take decisive steps to eliminate barriers to the deployment of advanced telecommunications infrastructure. The language of the Section is broad and mandatory: Federal and state regulators "shall" encourage the roll-out of advanced technologies (emphasis added) by "utilizing, in a manner consistent with

[9] Perhaps the most amusing example is MCI, which apparently just used its word processor to find every use of "Bell Atlantic" in its comments and replace it with "U S WEST." As a result, MCI's comments on U S WEST's Petition contain phantom responses to arguments U S WEST never made and even accuse U S WEST of failing to provide "evidence of underinvestment in Internet facilities in the Northeast." MCI at 39 (emphasis added).

the public interest, convenience, and necessity . . . regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment." There is nothing in the words of Section 706 that limits the regulatory barriers the Commission is required to remove. Nor does the text of Section 706 contain any limit on the Commission's power to forbear from applying regulations that frustrate innovation, other than that the power be exercised in the public interest.

The companies that are trying to keep U S WEST out of the market for advanced data services cannot point to any language in Section 706 that limits the use of regulatory forbearance or of the other regulatory measures enumerated in the Section. Instead, they argue that the term "regulatory forbearance" is a coded cross-reference to Section 10 of the Communications Act, which directs the Commission to forbear from enforcing rules that the development of competition has made unnecessary.[10] Section 10 explicitly states that it does not authorize the Commission to forbear from applying the requirements of Sections 251(c) or 271 of the 1996 Act.[11] The commenters seek to import this limitation, which by its express terms applies only to Section 10, into Section 706.[12]

---

[10] 1996 Act, Section 10 is codified at 47 U.S.C. § 160.

[11] See Section 10(d) ("Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.").

[12] See, e.g., Comments of AT&T Corp. in CC Docket No. 98-11 (attached and incorporated by reference into Comments of AT&T Corp.) ("AT&T Comments on Bell Atlantic's Petition") at 6-8; Opposition of MCI Telecommunications Corp. at 30; Comments of the Commercial Internet Exchange Association at 25-26; Consolidated Opposition of WorldCom, Inc. at 29.

As discussed below, the language and structure of Section 706 refute the commenters' strained interpretation. Section 706 provides a source of forbearance authority independent from Section 10 and subject to different criteria. Nothing in the 1996 Act would prevent the Commission, under appropriate circumstances, from using that authority to forbear from applying regulatory requirements set forth in Sections 251(c) and 271.

1. The Term "Regulatory Forbearance" In Section 706 Is Not Merely A Coded Reference To Section 10

There is no merit to the claim that Congress used the term "regulatory forbearance" in Section 706 merely as an implicit cross-reference to the Commission's Section 10 authority. A look at the plain language quickly reveals that Section 706 does not mention Section 10. Nor does Section 10, in delineating the scope of its grant of forbearance authority, make any reference -- explicit or implicit -- to Section 706.

Moreover, interpreting "regulatory forbearance" in Section 706 as merely a cross-reference to Section 10 would make the use of the term in Section 706 nugatory, in violation of the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect."[13] The determination of when to forbear under Section 10 is governed by mandatory standards contained in Section 10 itself: If the criteria set forth in Section 10(a) are satisfied, the Commission must forbear, and if they are not, it may not. The impact

[13] United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992); see N. Singer, 2A Sutherland Statutory Construction § 46.06 (5th ed. 1992).

on deployment of advanced telecommunications infrastructure is not among the listed criteria.[14] Thus, Section 10 leaves no room for the Commission to consider infrastructure issues. It follows that referring to Section 10 authority in Section 706 would be a completely empty gesture; the cross-reference would not result in a single extra act of forbearance and hence would contribute nothing to the Section's goals of removing barriers to investment and promoting advanced infrastructure. In other words, interpreting "regulatory forbearance" in Section 706 as a cross-reference to Section 10 would deny those words any operative effect.

It is clear also from the context that, when Congress used the term "regulatory forbearance" in Section 706, it meant something different from Section 10 forbearance. Section 706(a) is a directive, not only to the Commission, but to state regulators as well: It applies to "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services" (emphasis added). Congress evidently viewed the regulatory measures enumerated in Section 706(a) -- "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment" -- as options that are potentially available to

[14] The criteria set forth in Section 10(a) concern whether the regulatory requirement in question is needed to protect against anticompetitive practices. See Section 10(a)(1)-(3) (requiring forbearance if (1) enforcement of the regulation in question "is not necessary to ensure that the charges . . . for . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) enforcement is "not necessary for the protection of consumers," and (3) forbearance is "consistent with the public interest"); see also Section 10(b) ("If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.").

federal and state regulators alike. By contrast, Section 10 forbearance authority is not potentially available to state regulators; by its plain terms it applies only to the federal agency.[15]

Moreover, each of the options other than "regulatory forbearance" refers to a general type of regulation or regulatory action that may be utilized by federal or state authorities, not a specific statutory provision. "Price cap regulation," the most specific of the three items, refers not to a particular rule or statutory requirement, but rather to a general method of price regulation that is "the major alternative to rate-of-return regulation."[16] The Commission uses price cap regulation to control rates for interstate access services, but the method is equally applicable to state-level regulation as well: As long ago as 1994, 17 states reportedly had adopted an alternative regulatory plan involving price caps.[17] The other two items listed in Section 706(a), "measures that promote competition in the local telecommunications market" and "other regulating methods that remove barriers to infrastructure

---

[15] Section 10(a) provides that the Commission shall forbear when certain conditions are satisfied. The only reference in Section 10 to state regulators occurs in Section 10(e), which provides that a state may not frustrate the Commission's forbearance authority by continuing to enforce provisions with respect to which the Commission has decided to forbear. A state thus has no authority under Section 10 to decide to refrain from applying otherwise mandatory regulatory requirements within its enforcement jurisdiction. Section 706, by contrast, directs state regulators to "utiliz[e] . . . regulatory forbearance."

[16] Kellogg, et. al., Federal Telecommunications Law 431 (1992).

[17] See National Association of Regulatory Utility Commissioners, NARUC Report on the Status of Competition in Intrastate Telecommunications 214, Sep. 1, 1994 update.

investment," are obviously descriptions of general types of regulatory action rather than cross-references to specific statutory provisions.

In light of the other options listed in Section 706(a), it would be anomalous for Congress to have included a term that refers to a specific statutory provision; "it is a familiar principle of statutory construction that words grouped in a list should be given related meaning."[18] And "regulatory forbearance," like the other items on the list, has a general meaning -- the term is by no means a unique creation of Section 10. In the Commission's Competitive Carrier proceeding, which stretched from 1979 to 1985, the Commission used the terms "forbearance" and "regulatory forbearance" to refer to its policy of gradually exempting nondominant carriers from various tariff filing requirements under the Communications Act.[19] The purported source of that forbearance authority was of course not Section 10, which did not yet exist, but rather Section 203(b)(2) of the Communications Act.[20] The Commission

---

[18] Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8 (1985), citing to Securities Industry Assn. v. Board of Governors, 468 U.S. 207, 218 (1984).

[19] See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, 8 FCC Rcd. 7988, 7998 ¶ 51 (1993) ("In its Competitive Carrier docket, . . . the Commission adopted for [emerging carriers] a policy of regulatory forbearance"); Telemarketing Communications of South Central India, Inc., 5 FCC Rcd. 7712 ¶ 2 (1990) (referring to "the Commission's regulatory forbearance policies adopted in Competitive Carrier"); Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 2 FCC Rcd. 6600, 6617 n.33 (1987) ("the Fourth Report and Order in the Competitive Common Carrier proceeding . . . extended regulatory forbearance to all resellers"); Cox Cable Communications, Inc., 102 FCC 2d 110, 128 ¶ 36 (1985) ("In the Fifth Report and Order in the Competitive Carrier Rulemaking, . . . we determined that a policy of regulatory forbearance would help promote entry and expansion of DEMS and DTS systems.").

[20] Section 203(b)(2) provides that the "Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this

also has used "regulatory forbearance" to describe its decision to exempt the data processing industry from common carrier regulation under Title II of the Communications Act.[21] And the Commission uses "forbearance" to refer to the exercise of its authority under Section 332(c)(1)(A) to exempt Commercial Mobile Radio Service ("CMRS") providers from selected provisions of Title II of the Communications Act if certain conditions are met.[22] In short, "regulatory forbearance" has long been used to refer to an action by a regulatory agency to refrain from applying otherwise mandatory regulatory requirements contained in statutes or the agency's rules. The suggestion that that term in Section 706 automatically refers to Section 10 is wholly unsupported.[23]

---

section." The Supreme Court eventually invalidated the Commission's tariff forbearance policy on the ground that the statutory authority to "modify" regulatory requirements does not empower the Commission to make major changes to the regulatory regime. MCI Telecommunications Corp. v. AT&T, 512 U.S. 218 (1994); see also Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd. 7141, 7154-57 ¶¶ 21-25 (1996) (reviewing the history of the Competitive Carrier proceeding and related court challenges). For present purposes, the key point is that "forbearance" has been used generically to refer to Commission action to limit the applicability of regulatory requirements.

[21] See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 390 ¶ 17 (1980) (discussing implications of "regulatory forbearance with respect to data processing services"); North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, 101 FCC 2d 349, 356 ¶¶ 17-18 (1985) (referring to Computer I decision as "regulatory forbearance").

[22] See Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, 9 FCC Rcd. 2164, 2165 ¶ 4 (1994) ("Section 332(c)(1)(A) authorizes the Commission to take forbearance actions.").

[23] Nor is there any relevance to the fact that Section 10(a) mentions Section 332(c) forbearance but not Section 706 forbearance. See Comments of the Commercial Internet Exchange Association at 26; Opposition of MCI Telecommunications Corp.

The natural reading of Section 706(a) is that it empowers federal and state regulators to employ a variety of general regulatory methods, including forbearance from enforcing otherwise applicable regulatory requirements, when (i) doing so will encourage the widespread deployment of advanced telecommunications, and (ii) such forbearance is, in the words of the Section 706(a), "consistent with the public interest, convenience, and necessity." This grant of authority is independent of other statutory grants of authority, including Section 10, that are subject to entirely different sets of criteria and conditions.

Interpreting Section 706 as an independent grant of regulatory authority is necessary to effectuate the Section's purpose. Section 706, together with the 1996 Act's universal service provisions, reflects the critical importance Congress placed on ensuring that all Americans -- rural as well as urban -- have timely access to the communications tools of the new information age. This goal cannot be achieved simply by relying on Section 10 and the 1996 Act's other provisions for promoting competition. The high per-customer cost of serving many rural areas means that competition in those areas may be slow to develop and may not automatically lead to major infrastructure investment. Section 706 therefore authorizes and directs federal and state regulatory authorities to take concrete action. Without this grant

---

at 30-31. Section 10(a) includes the phrase "[n]otwithstanding section 332(c)(1)(A) of this Act" because that Section contains limitations on forbearance that otherwise might be read to limit Section 10 forbearance authority. Section 706 contains no such limitations, so Congress had no need to mention it in Section 10. Congress likewise had no need to mention Section 10 in Sections 706 or 332(c) because the limitations contained in Section 10(d) by their plain terms apply only to Section 10 forbearance.

of authority specifically tailored to the aims of Section 706, the 1996 Act's declarations of policy with respect to the widespread availability of advanced telecommunications capability would be nothing more than passive expressions of Congress's hopes. Congress plainly did not intend Section 706 to be so toothless.

2. Section 706 Forbearance Authority Is Not Subject To Limitations That Would Prevent It From Applying To Sections 251(c) And 271 In Appropriate Circumstances

The forbearance authority granted by Section 706 is narrowly tailored to a specific purpose -- encouraging the widespread deployment of advanced telecommunications infrastructure. Where regulatory forbearance would serve that purpose, the Statute contains no explicit or implicit limitations on the use of that tool, other than the requirement that it be "consistent with the public interest, convenience, and necessity."[24]

Section 706 is not a "general" grant of authority that must yield to specific statutory commands, as some of the commenters opposing U S WEST have asserted.[25] Rather than giving the Commission unstructured discretion to take measures that serve the public interest in unspecified ways, Section 706 requires action aimed at a clear and specific goal: removing barriers to infrastructure

---

[24] In contrast to the Commission's forbearance policy in the Competitive Carrier proceeding, Section 706 forbearance is based, not on language permitting the Commission to "modify" regulatory requirements, but rather on mandatory language directing the Commission to utilize "forbearance." Thus, the Supreme Court holding that "modify" refers to modest changes only -- and therefore that the Competitive Carrier tariff forbearance policy exceeded the Commission's authority -- has no bearing on the scope or validity of the Commission's authority to forbear under Section 706.

[25] See AT&T Comments on Bell Atlantic's Petition at 9-10.

investment. Such action need not wait for the completion of the inquiry required by Section 706(b), as some commenters erroneously assert;[26] Section 706(a) is a separate directive from Section 706(b), and it authorizes action at any time the Commission deems appropriate.

Some commenters suggest that when Section 706 refers to "regulatory forbearance," it means forbearance from agency rules but not from statutory provisions.[27] There is no basis for that contention. As discussed above, the Commission has long used the phrase "regulatory forbearance" to refer to policies that involved forbearance from the application of the common carrier provisions of Title II of the Communications Act. "Regulatory Forbearance" is also the title of the provision of the 1996 Act that added Section 10 to the Communications Act -- and Section 10 applies not just to agency rules but expressly to "any provision of this Act."[28] Thus, Congress plainly used the phrase "regulatory forbearance" to refer to forbearance from applying any regulatory requirement, whether statutory or administrative.[29] That meaning is consistent with the common use of the term "regulatory" to describe statutes as well as administrative rules.[30]

---

[26] See Opposition of the Telecommunications Resellers Association at 4-5.

[27] See, e.g., Opposition of ELI at 29-30.

[28] 1996 Act, Section 10(a), 47 U.S.C. § 401.

[29] It is ironic that, having first argued that Section 706 forbearance is a specific reference to Section 10, commenters then scramble to assert that, if the two are separate, Section 706 forbearance is not even the same type of authority as that under Section 10.

[30] See, e.g., Clarke v. Securities Industry Assn., 479 U.S. 388, 403-04 (1987) (discussing the weight courts should give to an agency's interpretation of a "regulatory statute"); Concrete Pipe and Products of California, Inc. v. Construction

Some commenters assert that other provisions of the 1996 Act limit the scope of the Commission's authority under Section 706. For example, AT&T suggests that Section 10(d) reveals an intention to withhold from the Commission any discretion, regardless of the specific statutory source, to forbear from the application of Sections 251(c) and 271.[31] But the plain language of Section 10(d) refutes that contention: The Section states that "the Commission may not forbear from applying the requirements of Section 251(c) or 271 under subsection (a) of this section," (emphasis added) and thus clearly pertains only to Section 10(a) forbearance. It was logical for Congress to limit the scope of Section 10(d) in this fashion. Congress evidently believed that the goals of Section 10 -- that is, to promote an increasingly competitive and deregulated environment -- would never be served by forbearance from applying Sections 251(c) and 271.[32] Section 706 forbearance, however, is aimed at an entirely different goal and hence is not subject to the same limitation.[33]

Laborers Pension Trust for Southern California, 508 U.S. 602, 642 (1993) (noting that private contractual provisions cannot defeat the application of a "regulatory statute" that is otherwise within the powers of Congress).

[31] See AT&T Comments on Bell Atlantic's Petition at 9.

[32] In a separate court proceeding, U S WEST has argued that Section 271 is unconstitutional because it singles out a narrow group of specified companies for special restrictions. See SBC Communications v. FCC, No. 7:97-CV-163-X (N.D.Tex.).

[33] This is not to say that the Commission may use its authority under Section 706 to forbear from applying Sections 251(c) and 271 without regard to the competitive consequences. Any exercise of that authority must be "consistent with the public interest," a requirement that presumably would preclude acts of forbearance that would so hinder the development of competition that the benefits of encouraging the deployment of advanced telecommunications capability would be outweighed.

AT&T also purports to find in Sections 271(a) and 271(d)(4) a Congressional determination to make Section 271 immune from forbearance. It points to the statement in Section 271(a) that no BOC may offer interLATA services "except as provided in this section." According to AT&T, this provision shows that Congress intended the requirements of Section 271 to be the paramount and exclusive rules governing BOC entry into interLATA service markets.[34] But forbearance authority, by its very nature, permits an agency to make exceptions to rules whose application otherwise would be mandatory; there would be no point in Congress's providing an agency with explicit "forbearance" authority that applies only to rules that already permit exceptions at the discretion of the agency. Therefore, Section 271(a) does not immunize Section 271 from the Commission's Section 706 forbearance authority.[35]

AT&T and others also point to Section 271(d)(4), which provides that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[36] But forbearance under Section 706, such as U S WEST has requested in its Petition, would not limit or extend the competitive checklist; rather, it would involve a narrow exception to the applicability of the checklist. The checklist itself would remain untouched -- the

---

[34] AT&T Comments on Bell Atlantic's Petition at 8-9.

[35] If Congress had intended to create such immunity, it would have done so expressly; it need only have prefaced Section 271(a) with the phrase "notwithstanding any other provisions of this Act," or included in Section 706 an express limitation comparable to that found in Section 10(d).

[36] AT&T Comments on Bell Atlantic Petition at 8-9; Comments of the Commercial Internet Exchange Association at 24, 26; Opposition of the Association for Local Telecommunications Services at 4.

Commission would simply refrain from applying it to a particular service. Thus, the forbearance requested in U S WEST's Petition is entirely consistent with Section 271(d)(4).

B. The Commission Has Authority Even Apart From Section 706 To Grant The Relief That U S WEST Requests

U S WEST's ability to provide advanced data services free of the unbundling and resale obligations of Section 251(c) does not depend solely on Section 706. In the first place, Section 251(c) does not apply to U S WEST's provision of advanced data services. Moreover, even if that Section did potentially apply to U S WEST's data services, the Commission still would have authority to exempt the elements used to provide those services from the unbundling requirements of Section 251(c)(3). The Commission also has authority to modify LATA boundaries with respect to the provision of advanced data services.

The unbundling and resale obligations of Section 251(c) do not apply to U S WEST's advanced data services and the elements used to provide them, because such data services are outside the intended scope of Section 251(c). Specifically, Section 251(c) applies to U S WEST and other ILEC only in their capacity as local exchange carriers.[37] The 1996 Act defines "local exchange carrier"

[37] Nobody suggests, for example, that the long distance facilities and services of GTE and Sprint are subject to unbundling and resale obligations under Section 251(c) simply because those carriers are also incumbent LECs. Moreover, the Commission has recognized in other contexts that an entity can be a LEC (or a carrier) with respect to some of its services and not a LEC (or a carrier) with respect to others. See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 22054 ¶ 309 (1996) (stating that a BOC affiliate will be subject to unbundled access requirements only with